No. 06-35669

United States Court of Appeals for the Ninth Circuit

MUHAMMAD SHABAZZ FARRAKHAN, A/K/A ERNEST S. WALKER-BEY; AL-KAREEM SHADEED; MARCUS PRICE; RAMON BARRIENTES; TIMOTHY SCHAAF; AND CLIFTON BRICEÑO,

Plaintiffs-Appellants,

— v. —

CHRISTINE O. GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON; SAM REED, SECRETARY OF STATE FOR THE STATE OF WASHINGTON; HAROLD W. CLARKE, DIRECTOR OF THE WASHINGTON DEPARTMENT OF CORRECTIONS; AND THE STATE OF WASHINGTON,

Defendants-Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NO. CV-96-076-RHW THE HONORABLE JUDGE ROBERT H. WHALEY PRESIDING

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS IN RESPONSE TO *AMICI CURIAE* BRIEFS

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Plaintiffs Muhammad Shabazz Farrakhan, Al-Kareem Shadeed, Marcus Price, Ramon Barrientes, Timothy Schaaf, and Clifton Briceño (collectively, "Plaintiffs") submit this brief pursuant to the Court's order, dated June 28, 2010, directing the parties to file supplemental briefs in response to *amici curiae* briefs.

SUMMARY OF ARGUMENT

This case is about whether Defendants may deny the most fundamental right that a citizen has in our democracy—the right to vote—"upon conviction by a criminal justice system that … is materially tainted by discrimination and bias." *Farrakhan v. Gregoire*, 590 F.3d 989, 1016 (9th Cir. 2010) ("*Farrakhan II*"), *reh'g en banc granted*, 603 F.3d 1072 (9th Cir. 2010). Plaintiffs' argument is not that *all* felon disfranchisement laws violate Section 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973(a), nor that all felon disfranchisement laws resulting in statistical disparities *alone* are unlawful. Rather, it is that Section 2 of the VRA does not permit Defendants to condition the right to vote on the results of a system that they have *conceded* is racially discriminatory.

The district court concluded that the *uncontested* record reflects "compelling evidence of racial discrimination and bias in Washington's criminal justice system," which "'clearly hinder[s] the ability of racial

minorities to participate effectively in the political process….'" *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273, at *6 (E.D. Wash. July 7, 2006) (quoting *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003) ("*Farrakhan I*"). Defendants failed to present "*any* evidence to refute Plaintiffs' experts' conclusions," which the district court determined were "admissible, relevant, and persuasive." *Id.* (emphasis added).

"Section 2 of the VRA demands that such racial discrimination not spread to the ballot box." *Farrakhan II*, 590 F.3d at 1015. Indeed, such discrimination already has, as Blacks, Latinos, and Native Americans in Washington are unduly denied access to the fundamental right that is "preservative of all" others. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Nearly one-quarter—an incredible 24%—of all Black men, and nearly 15% of the entire Black population, are disfranchised in Washington. This is precisely the kind of discriminatory result that Section 2 was enacted to proscribe.

Incredibly, Defendants and their *amici*, the Pacific Legal Foundation and the Center for Equal Opportunity (hereinafter, "PLF"), argue that Section 2 provides no remedy because, in their view, felon disfranchisement laws are immune from federal regulation categorically, even where, as here, the challenged law indisputably perpetuates "racial discrimination and bias."

Farrakhan, 2006 WL 1889273, at *6. That result is incompatible with the text and purpose of Section 2.

Finally, applying Section 2 here is indisputably constitutional. The contrary arguments of Defendants and their *amici* conflict with clear precedent establishing Congressional authority under the Fifteenth Amendment to prohibit all voting practices with discriminatory results. Those precedents apply *a fortiori* here, where the disparate impact resulting from Washington's felon disfranchisement law is *caused* by racial discrimination.

For these reasons, and those set forth in Plaintiffs' previous submissions, this Court should reverse the district court's grant of summary judgment for Defendants and enter summary judgment in favor of Plaintiffs.

ARGUMENT

I. WASHINGTON'S FELON DISFRANCHISEMENT LAW VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT

Section 2 of the VRA is divided into two subsections, and states, in relevant part,

> (a) ***No voting qualification*** or prerequisite to voting or standard, practice, or procedure shall be imposed … in a manner which ***results*** in a denial or abridgment of the right ***of any citizen*** to vote ***on account of race*** … as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, … the political processes leading to nomination or election … are not equally open to participation by members of a class of citizens protected by subsection (a)….

42 U.S.C. § 1973 (emphases added). Subsection (a) clearly states that all "voting qualification[s]" or "practice[s]" fall within its reach as a matter of law. Its protections apply, without limitation, to "any citizen." *Id.* Thus, where a challenged law is a "voting qualification" under subsection (a), the only remaining question is whether it "results in a denial or abridgement of the right … to vote on account of race or color" under the "totality of the circumstances," a factual inquiry, as provided under subsection (b). *Id.*; *see Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

Here, Washington's felon disfranchisement law violates Section 2 because: (1) it is a "voting qualification" within the meaning of subsection (a);

and (2) it imports racial discrimination from Washington's criminal justice system into Washington's political process, in violation of subsection (b).

A. Washington's Felon Disfranchisement Law is a "Voting Qualification" Within the Plain Meaning of Section 2(a) of the VRA

As Defendants have conceded, Washington's felon disfranchisement law[1] is a "voting regulation" that determines who may "be entitled to participate in making the law." Appellees' Br. at 43-44.[2] And, as a panel of this Court ruled previously, no plausible reading of subsection 2(a)'s plain text would exempt Washington's felon disfranchisement law from coverage as a "voting qualification." *See Farrakhan I*, 338 F.3d at 1016 ("Felon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.") (emphasis in original). "It is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualification[s].' And it is equally plain that [a felon disfranchisement law] disqualifies a group of people from voting. These two

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[1] Article VI, Section 3 of the Washington State Constitution disqualifies "all persons convicted of an infamous crime" from the "elective franchise." An "infamous crime" is one that is punishable by death or imprisonment in a state correctional facility. *See* Revised Code of Washington ("RCW") § 29.01.080. Voting rights are provisionally restored when a person "is not under the authority of the department of corrections." RCW § 29A.08.520. The disfranchised population includes individuals in "community custody" (probation or parole), an estimated 27,000 individuals who are *not* currently incarcerated. *See* Br. of *Amici Curiae* ACLU of Washington, *et al.*, at 6.

[2] "Appellees' Br." refers to the Defendants' Brief before the three-judge panel.

propositions should constitute the entirety of our analysis. Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage." *Hayden v. Pataki*, 449 F.3d 305, 367-68 (2d Cir. 2006) (Sotomayor, J., dissenting).

The "cardinal canon" of statutory interpretation is that a statute must be interpreted according to its plain meaning. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). This fundamental rule is simple and straightforward: "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," and "[w]hen," as here, "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States*, 489 U.S. 424, 430 (1981)). Indeed, every member of this Court has authored an opinion recognizing that a court's interpretation of a statute should begin and end with the text when that text is clear.[3]

Ignoring the plain text, Defendants and PLF argue that Washington's felon disfranchisement law is exempt from Section 2 because Congress has historically approved of state felon disfranchisement. *See* Appellees' Br. at 12-13; PLF Br. at 13-15. Defendants and PLF, however, conflate two distinct issues. Merely because a particular voting practice is acceptable as a general

[3] *See* Br. for *Amicus Curiae* Brennan Center at 12 n.7 (citing cases) (hereinafter "Brennan Br.")

matter, it does not follow that it is *always* permissible and, therefore, exempt from Section 2 analysis. To the contrary, a wide range of "voting qualifications" or "practices" that are generally permissible are still subject to Section 2: at-large districting plans, judicial elections, punch card voting machines, and property qualifications are all generally permissible "voting qualification[s]" or "practice[s]," but challenges to each are cognizable under Section 2.[4]

Washington's felon disfranchisement law is no different. Indeed, were Washington's felon disfranchisement law enacted with discriminatory *intent*, there could be no question that it would violate Section 2. As originally enacted in 1965, Section 2 of the VRA "tracked …. the text of the Fifteenth Amendment," to prohibit all voting "practices 'imposed or applied'" with discriminatory intent. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1240 (2009) (quoting 79 Stat. 437). Given that intentionally discriminatory felon disfranchisement laws are unconstitutional, *see Hunter v. Underwood*, 471 U.S.

[4] *See Gingles*, 478 U.S. at 46 (at-large districting plan); *Chisom v. Roemer*, 501 U.S. 380 (1991) (judicial elections); *Sw. Voter Educ. Project v. Shelley*, 344 F.3d 914, 918-19 (9th Cir. 2003) (noting that plaintiffs alleging that the "disparate impact of punch-card ballots on minority voters violated Section 2" had demonstrated a "possibility of success on the merits," but denying injunction for failure to establish the requisite "strong likelihood" of success); *Smith v. Salt River Project Agric. Improvement and Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (challenge to property requirement was cognizable under Section 2, but rejecting claim because plaintiffs "stipulated to the nonexistence" of "racial discrimination").

222 (1985) (invalidating Alabama's felon disfranchisement statute as intentionally discriminatory), it follows that such laws also violate Section 2. *Cf. Garza v. County of Los Angeles*, 918 F.2d 763, 770 (9th Cir. 1990) ("Creation of this 'results' test for discrimination under Section 2 did not affect the remedies under Section 2 for intentional discrimination.").

The question here, therefore, is not whether felon disfranchisement laws as a class are within the scope of Section 2(a)—as "voting qualification[s]," they must be—but whether *this particular* felon disfranchisement law violates Section 2 by "result[ing] in a denial or abridgment" of the right to vote "on account of race," which is a question of *fact* under the totality of the circumstances inquiry set forth in subsection 2(b). Thus, the Sixth Circuit, in considering a Section 2 challenge to Tennessee's felon disfranchisement law, did not question the applicability of Section 2, but rather focused its analysis on whether the plaintiffs had demonstrated a violation under the totality of the circumstances. *See Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986).

B. Washington's Felon Disfranchisement Law "Results In a Denial" of the Right to Vote "on Account of Race" under Section 2(b) of the VRA

As provided in subsection (b), a plaintiff alleging a violation of Section 2 must demonstrate that, under the "totality of circumstances, … the political processes … are not equally open to" minority citizens. 42 U.S.C. § 1973(b). This analysis is necessarily a "flexible, *fact-intensive* test." *Gingles*, 478 U.S. at 46 (emphasis added). As is required under *Gingles*, Plaintiffs have shown that Washington's felon disfranchisement law "interacts with social and historical conditions"—namely, pervasive racial discrimination throughout Washington's criminal justice system—"to cause an inequality in the opportunities enjoyed by [minority] and white voters…" *Id.* at 47.

This is the rare case where Plaintiffs submitted "compelling" evidence, and Defendants failed to contest it. Substantial racial disparities exist at every stage of Washington's criminal justice system—from stops, to charging, to sentencing—that do not reflect the extent to which racial minorities actually participate in crime. These disparities "cannot be explained by factors other than racial discrimination." *Farrakhan II*, 590 F.3d at 1012. As the district court recognized, unlike in *Salt River*, 109 F.3d 586, where the plaintiffs "stipulated" to the absence of racial discrimination, Plaintiffs have demonstrated that racial discrimination is the *cause* of the disparities evident in

Washington's criminal justice system. *Farrakhan*, 2006 WL 1889273, at *6 n.7. The record reflects a range of discriminatory conduct, such as racial profiling; bias by discretionary actors in the criminal justice system; and organizational practices with racially disparate effects that lack any penological justification. *See* Appellants' Opening Br. at 9-16.

Weighing this evidence, the district court was ultimately "compelled to find that there is discrimination in Washington's criminal justice system on account of race," and that such discrimination "'clearly hinder[s] the ability of racial minorities to participate effectively in the political process…'" *Farrakhan*, 2006 WL 1889273, at *6 (quoting *Farrakhan I*, 338 F.3d at 1220). The panel rightly held that these conclusions warranted a finding of liability: because "some people becom[e] felons not just because they have committed a crime, but because of their race, then that felon status cannot, under § 2 of the VRA, disqualify felons from voting." *Farrakhan II*, 590 F. 3d at 1014.[5]

Thus, although felon disfranchisement laws may be permissible generally, *this particular* felon disfranchisement law violates Section 2. Any other holding would permit Defendants to maintain a "voting qualification" that

[5] Plaintiffs have discussed the application of the "Senate Factors" relevant to Section 2's "totality of the circumstances" inquiry in previous submissions. *See* Opening Br. at 21-56; Reply Br. at 10-19.

"results" in the denial of Plaintiffs' right to vote "on the basis of race," in clear contravention of Section 2.

C. The VRA's Legislative History Supports Its Plain Meaning

Section 2's unambiguous language renders any inquiry beyond its plain text unnecessary. If, however, this Court were to look beyond Section 2's text to its legislative history, it would be compelled to find that Section 2 applies to Washington's felon disfranchisement law.

Section 2, as originally enacted in 1965, prohibited all voting laws enacted with discriminatory intent. *See supra*, § I.A. The 1982 amendments to the VRA *broadened* the scope of Section 2 by adopting a "result[s]" test, and there is nothing in the legislative history suggesting that Congress intended to narrow the range of voting "practice[s]" falling within the statute's scope. *Cf. Chisom*, 501 U.S. at 404 ("It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection."). Nor is there any evidence in the legislative history indicating an intention to exempt felon disfranchisement from Section 2's coverage. Rather, the Senate explained that "the revised version of Section 2 … could be used effectively to

challenge voting discrimination *anywhere* that it might be proved to occur." S. Rep. No. 97-417, at 15 (1982) (emphasis added).[6]

The legislative history of *Section 4* of the VRA, on which Defendants and PLF rely exclusively, *see* Appellees' Br. at 12-13, PLF Br. at 13, does not compel a different reading of *Section 2*, as the legislative history of one provision of a statute cannot be imputed to discern the meaning of an entirely separate provision. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.39 (1977). This is particularly true here, because Sections 2 and 4 employ different language, serve different purposes, and have different legislative histories. Section 4 bans the use of any "test or device" to deny the right to vote, specifying four categories of prohibited practices such as literacy tests, regardless of the intent or effect of those practices. *See* 42 U.S.C. § 1973b(c). Section 2, by contrast, applies broadly and without exception to any "voting qualification," "prerequisite," "standard," "practice," or "procedure." It does not prohibit any particular types of voting laws *per se*, but only those enacted with discriminatory intent or which result in discrimination under the totality of the circumstances.

Plainly, the fact that Congress did not seek to ban *all* felon disfranchisement laws under Section 4 does not mean that Congress intended to

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[6] *See also* Brennan Br. at 18-22.

immunize *racially discriminatory* felon disfranchisement laws from challenges brought under Section 2.[7] If anything, the "fact that … Congress [was] sufficiently cognizant of felon disenfranchisement laws to carve them out from the scope of § 4, yet made no such statements in regard to § 2 … indicates that Congress did not in fact intend a similar restriction in the § 2 context." *Simmons v. Galvin*, 575 F.3d 24, 56 (1st Cir. 2009) (Torruella, J., dissenting).

PLF attempts to read significance into the fact that the legislative record surrounding the 1982 amendments to the VRA does not contain express references to felon disfranchisement laws. *See* PLF Br. at 14. But as the Supreme Court has cautioned, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980). Judicial narrowing of the statute's plain terms is inappropriate, particularly given that "the [Voting Rights] Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom*, 501 U.S. at 403 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

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[7] Nor can the legislative enactments of a subsequent Congress, such as the NVRA and HAVA, shed light on the intentions of the Congress that enacted the original VRA, or its amendments in 1982. *See United States v. Sw. Cable Co.*, 392 U.S. 157, 170 (1968) ("The views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance.") (internal quotation marks and citation omitted).

D. The Clear Statement Rule Does Not Apply to this Case

The clear statement rule, which provides that an ambiguous statute should not be construed so as to alter the "usual constitutional balance" between state and federal power absent a clear statement of Congressional intent, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), does not apply here for two reasons. *First*, statutory ambiguity is an absolute prerequisite to application of the clear statement rule. *See Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (rejecting clear statement rule where "the text of the [challenged statute] is not ambiguous"); *Salinas v. United States*, 522 U.S. 52, 60 (1997) (the clear statement rule "d[oes] not apply when a statute [i]s unambiguous."). No court or party has ever identified a specific word or phrase of Section 2 as ambiguous. The fact that it applies to all "voting qualification[s]," "does not demonstrate ambiguity. It demonstrates breadth." *Yeskey*, 524 U.S. at 212 (1998) (internal citations and quotation marks omitted).

An unambiguous statute – like Section 2 – by definition satisfies any need for a "clear statement." Congress employed the broadest possible language in Section 2, with the clear intent that it applies to all "voting qualification[s]" and "practice[s]" that "result" in racial discrimination. It is difficult to imagine how Congress could have expressed its intent more clearly.

Rather than identify ambiguity in Section 2's text, Defendants and PLF erroneously assert that the Second Circuit applied the clear statement rule when considering the statute's applicability to New York's felon disfranchisement law in *Hayden*, 449 F.3d 305. *See* Appellees' Br. at 21, PLF Br. at 18. A majority of the Second Circuit, however, *rejected* the rule's application in *Hayden*.[8] Nor did the First or Sixth Circuits invoke the clear statement rule in cases considering Section 2 challenges to felon disfranchisement laws. *See Simmons*, 575 F.3d at 36-42 (basing its ruling on the panel's reading of the legislative history)[9]; *Wesley*, 791 F.2d 1255 (applying Section 2's totality of the circumstances analysis to Tennessee's disfranchisement law). Thus, the majority of Circuits to have considered Section 2 challenges to felon disfranchisement laws have not applied the clear statement rule.[10]

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[8] Two members of the eight to five majority in *Hayden* declined to join Judge Cabranes' opinion concerning the clear statement rule. *See* 449 F.3d at 337 (Straub, J., joined by Sack, J., concurring in part and concurring in the judgment) ("We do not join in any holding that a clear statement rule applies here, as we believe such a rule … would be inappropriate in the voting rights context."). Thus, seven of the thirteen judges of the *en banc* Second Circuit *rejected* application of the clear statement rule. *See id.* at 364 n.3 (Calabresi, J., dissenting) ("In referring to the 'majority opinion,' I exclude those portions … that seek to apply a 'clear statement rule,' as those portions only command the support of a minority of the Court.").

[9] *But see id.* at 49 (Torruella, J., dissenting) (rejecting majority's view of the legislative record "[g]iven the clarity of the VRA language").

[10] Only the Eleventh Circuit has applied the clear statement rule in this context. *See Johnson v. Bush*, 405 F.3d 1214, 1232 n.35 (11th Cir. 2005). *But see id.* at 1250 (Barkett, J., dissenting) ("[T]he Supreme Court has explicitly

Second, applying Section 2 to Washington's felon disfranchisement law does not disturb the existing balance of state and federal power. As the Court explained in *Gregory* – the very case on which Defendants and their *amici* rely – the clear statement rule applies only where federal legislation is interpreted to shift the "usual constitutional balance." *See Gregory*, 501 U.S. at 460. In *Gregory*, the Court determined that applying a federal prohibition on age-based employment discrimination to a state's qualifications for judges would entail such a shift. *See id.* at 463-64. But unlike age-based discrimination, racial discrimination is expressly prohibited by the Reconstruction Amendments. For purposes of the clear statement rule, legislation enacted pursuant to Congress's express authority to stamp out racial discrimination does not entail a *new* shift in the balance of federal/state power. Rather, such a shift occurred long ago with the adoption of the Reconstruction Amendments themselves, which "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *Gregory*, 501 U.S. at 468 (quoting *City of Rome v. United States*, 446 U.S. 156, 179 (1980)).[11]

Thus, the Supreme Court has declined to apply the clear statement rule when applying Section 2 of the VRA. Tellingly, in two cases decided by the

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held that the *Gregory* 'plain statement' canon is wholly inapplicable where the statutory language unambiguously applies …").

[11] *See also* Brennan Br. at 23-26.

Supreme Court *on the same day* as *Gregory*, the Court declined to apply the clear statement rule in determining whether Section 2 applies to particular voting "practice[s]." *See Chisom*, 501 U.S. 380 (applying Section 2 to judicial elections without referring to clear statement rule); *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419 (1991) (same).

Felon disfranchisement laws are election regulations,[12] and the federal government already wields wide authority in this arena by virtue of the Fifteenth Amendment. As Justice Scalia observed in his opinion in *Chisom*, the Court has "tacitly rejected a 'plain statement' rule as applied to the unamended § 2 in *City of Rome v. United States* …. I am content to dispense with the 'plain statement' rule in the present cases." 501 U.S. at 412 (Scalia, J., dissenting). *See also Johnson*, 405 F.3d at 1250 (Barkett, J., dissenting) ("[T]he Fourteenth and Fifteenth Amendments altered the constitutional balance between the two sovereigns—*not* the Voting Rights Act, which merely enforces the guarantees of those amendments.") (emphasis added); *Farrakhan v. Locke*¸ 987 F. Supp.

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[12] This case does not affect Washington's criminal justice system, as its felon disfranchisement law is a civil election regulation codified in the Election Code, not the Criminal Code. *Compare* RCW Section 29A.08.520 *with* Title 9A RCW (criminal code). *Accord State v. Schmidt*, 23 P.3d 462, 474 (Wash. 2001) (Washington's disfranchisement law is "a nonpenal exercise of the power to regulate the franchise."). Defendants themselves characterize Washington's felon disfranchisement law as a "voting regulation," and not a penal law. *See* Appellees' Br. at 43. *See also* Br. of *Amici Curiae* Nat'l Black Police Ass'n at 7-22; Br. of *Amici Curiae* Leading Criminologists at 5-18, 21-22.

1304, 1309 (E.D. Wash. 1997) ("[T]he 'plain statement' rule is simply inapplicable in the context of the VRA.").

II. CONGRESS HAS CONSTITUTIONAL AUTHORITY TO PROHIBIT WASHINGTON'S FELON DISFRANCHISEMENT LAW

Two propositions control the constitutional questions in this case. *First*, Congress has the authority to prohibit all voting practices with racially discriminatory results. Every court to consider the constitutionality of Section 2's results test has sustained its requirement that "[n]o voting qualification" may be imposed that "results" in the denial of the right to vote on account of race. *See Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002, 1003 (1984) (affirming dismissal of a claim that Section 2's results test "exceeds the power vested in Congress by the Fifteenth Amendment") (internal citations and quotation marks omitted)[13]; *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J, concurring) ("the Section 2 results test [should] be accepted and applied" by the lower courts).

Second, felon disfranchisement laws are not, *as a class*, immune from Congressional authority. As the Fourteenth Amendment directly prohibits felon

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[13] Although *Brooks* was a summary dismissal, such dispositions are binding on the lower courts. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (Supreme Court summary dispositions are binding on lower courts); *United States v. Blaine County*, 363 F.3d 897, 904-05 (9th Cir. 2004) (rejecting challenge to Section 2's constitutionality on grounds that *Brooks* is binding).

disfranchisement laws enacted with discriminatory intent, *see Hunter*, 471 U.S. 222, Congress clearly has the authority to prohibit such laws by statute. *Cf. United States v. Georgia*, 546 U.S. 151, 158 (2006) ("[N]o one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce ... the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.") (omission, emphasis in original) (internal citation omitted).[14]

The question here, therefore, is not whether felon disfranchisement laws properly fall within Congressional authority, but rather whether they are the only laws exempt from Congress's power to prohibit "voting qualifications" with discriminatory results. As demonstrated below, there is no basis for such *sui generis* treatment.

A. Congress Has Power under the Fifteenth Amendment to Prohibit All Voting Laws – Including Felon Disfranchisement Laws – that Result in Racial Discrimination

Congressional enforcement power under the Fifteenth Amendment can reach Washington's felon disfranchisement law for two separate reasons. *First*, Congress has the power to ban voting practices that perpetuate discrimination from outside the electoral system. For instance, the Court has held that Congress has the authority to prohibit literacy tests, because such tests import

[14] *See also* Br. of *Amici Curiae* Law Professors at 21-22.

discrimination from the education system into the political process. *See Gaston County v. United States*, 395 U.S. 285, 287, 291 (1969) (noting that its "decision is premised … on substantial evidence that the [defendant] deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test."); *Oregon v. Mitchell*, 400 U.S. 112, 132-33 (1970) (noting "this country's history of discriminatory educational opportunities").[15] Just as discrimination in a state's educational system can justify the suspension of literacy tests, discrimination in Washington's criminal justice system justifies federal regulation of its disfranchisement law.

Indeed, the application of Section 2 in this context is a more limited exercise of Congressional power than that which was upheld in the literacy cases. While *all* literacy tests are banned categorically, Section 2 prohibits only those felon disfranchisement laws that result in racial discrimination. Moreover, the Court in *Mitchell* upheld a prohibition on literacy tests in Arizona despite the fact that there was no record of education discrimination there, because Arizona's literacy test had the effect of perpetuating discrimination from *other states'* education systems. *See* 400 U.S. at 133. Under Section 2's totality of the circumstances test, however, judicial inquiry is

[15] *See also* Br. of *Amici Curiae* Law Professors at 15-18, 22-24.

limited to facts within the jurisdiction in question. *See Farrakhan II*, 590 F.3d at 998 (describing the "Senate Factors" relevant to Section 2's "totality of the circumstances" analysis, including "the extent to which members of the minority group *in the state or political subdivision* bear the effects of discrimination…") (quoting S. Rep. No. 97-417, at 28-29) (emphasis added).

Second, "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect." *City of Rome*, 446 U.S. at 175. *See also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 482 (1997) ('"The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself."') (quoting S. Rep. No. 97-417, at 39). Indeed, courts have routinely held that Section 2 applies to a wide range of facially neutral voting practices that can have the "result" of weakening minority voting power, without raising constitutional concerns. *See supra* § I.A..[16]

To be clear, Plaintiffs' claim here is not one of mere disparate impact, as Section 2's results test requires a more searching inquiry into whether minority voters have an equal opportunity to participate in the political process under "the totality of the circumstances." *See supra* § I.B. But where, as here, the

[16] *See also* Br. for *Amici Curiae* Law Professors at 24 (citing cases).

State conditions the right to vote on the basis of a criminal justice system that is materially tainted by racial discrimination, Congress may proscribe a remedy.

B. Section 2 of the Fourteenth Amendment Does Not Limit Congressional Authority to Prohibit Felon Disfranchisement Laws that Result in Racial Discrimination

Richardson v. Ramirez, 418 U.S. 24, 54 (1974), and its *dicta* describing felon disfranchisement laws as having an "affirmative sanction" in Section 2 of the Fourteenth Amendment, do not immunize such laws from Congressional legislation.

First, the Fourteenth Amendment does not "sanction" *racially discriminatory* disfranchisement laws. As the Court stated in *Hunter*,

> [W]e are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment *and operation* of [Alabama's felon disfranchisement law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez*, *supra*, suggests the contrary.

471 U.S. at 233 (emphasis added). Thus, even if felon disfranchisement laws are generally permissible, *racially discriminatory* disfranchisement laws are not immune from Congressional prohibition. In this sense, Section 2 of the Fourteenth Amendment is no different from Section 1 of the Thirteenth Amendment, which permits states to sentence prisoners to labor, *see* U.S. Const. amend. XIII, § 1, but which does not permit states to impose that penalty

on a discriminatory basis, and has never been read as a limit on Congress's enforcement power. *See Gates v. Collier*, 501 F.2d 1291, 1299 (5th Cir. 1974).

Second, Section 2 of the Fourteenth Amendment places no independent limitations on Congress's powers to regulate felon disfranchisement: "the absence of a constitutional prohibition does not somehow bar a statutory one. Simply because the Fourteenth Amendment does not itself prohibit States from enacting a broad array of felon disenfranchisement schemes does not mean that Congress cannot do so through legislation—provided, of course, that Congress has the authority to enact such a prohibition." *Harvey v. Brewer*, 605 F.3d 1067, 1077 (9th Cir. 2010).

Indeed, the Reconstruction-era Congress that drafted Section 2 of the Fourteenth Amendment exercised just such authority, prohibiting certain types of felon disfranchisement. As explained in *Harvey*, Section 2 of the Fourteenth Amendment permits states to disfranchise individuals for both common law and statutory felonies.[17] *See id*. at 1075. But the same Congress that drafted the Fourteenth Amendment also prohibited the readmitted states from disfranchising individuals for *statutory* felonies,[18] demonstrating that Section 2

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[17] Although the precise list of crimes considered felonies at common law is subject to some debate, it is undoubtedly more limited than the range of crimes that can be defined as felonies by statute. *See Harvey*, 605 F.3d at 1072-73.

[18] Concurrent with the adoption of the Fourteenth Amendment, the Fortieth Congress restricted the ability of former confederate states to disfranchise

of the Fourteenth Amendment does not somehow limit Congressional authority to regulate state felony disfranchisement.

Third, even if, contrary to the Supreme Court's holding in *Hunter*, Section 2 of the Fourteenth Amendment limited Congress's powers to enforce the Fourteenth Amendment, it would not also limit Congress's enforcement powers under the *Fifteenth Amendment*. Although the Fourteenth Amendment only imposes a penalty of reduced representation for discriminatory voting practices, the Fifteenth Amendment expressly and categorically prohibits racial discrimination in voting, and contains no exception for felon disfranchisement laws. *Compare* U.S. Const. amend. XIV, § 2 *with* amend. XIV, § 1. As a subsequent enactment, the Fifteenth Amendment is controlling where there is any conflict with the Fourteenth.[19]

Indeed, the fact that the Reconstruction Congress expressly considered, but ultimately rejected, several proposals to include an exception for felon disfranchisement laws in the Fifteenth Amendment demonstrates that such laws

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felons. The Reconstruction Act of March 2, 1867 set the conditions for constitutional conventions in the former Confederate States, and permitted the exclusion of *only* those citizens "disfranchised for … rebellion or for *felony at common law*." ch. 153, 14 Stat. 428 (1867) (emphasis added). Thus, the Act prohibited disfranchisement for *statutory* felonies. *See Harvey*, 605 F.3d at 1077. Subsequently, Congress passed five Restoration Acts readmitting Confederate States to Congress, with each Act containing the same limitation. *See, e.g.*, ch. 69, 15 Stat. 72 (1868) (readmitting Arkansas).

[19] *See also* Br. for *Amicus Curiae* Constitutional Accountability Center ("CAC") at 15-18.

are not beyond the reach of Congress's Fifteenth Amendment enforcement powers.[20] The framers of the Reconstruction Amendments were "quite capable" of drafting exceptions for felon disfranchisement laws, and could have incorporated such an exception into the Fifteenth Amendment had they "intended to do so." *Harvey*, 605 F.3d at 1077.

C. *City of Boerne* Is No Bar to Applying Section 2 of the VRA to Washington's Felon Disfranchisement Law

The "congruence and proportionality" test articulated in *City of Boerne v. Flores*, 521 U.S. 507 (1997), does not prohibit the application of Section 2 to Washington's felon disfranchisement law, for two reasons.

First, the Supreme Court has never applied *Boerne* to a statute aimed at racial discrimination. Both the Fourteenth and Fifteenth Amendments empower Congress to enforce prohibitions on racial discrimination by all "appropriate legislation," U.S. Const. amend. XIV, § 5; amend. XV, § 2, a broad grant of authority intended by the framers[21] of the Reconstruction Amendments to mirror Congress's power under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18. *See South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966)

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[20] *See* CAC Br. at 19-23 (citing Cong. Globe, 40th Cong., 3d Sess. 743-44, 1012-13, 1029, 1041,1305, 1426-28 (1869), and describing multiple proposals – all of which were rejected – for an exception for felon disfranchisement laws in the Fifteenth Amendment).

[21] *See also* CAC Br. at 8 (citing Congressional record illustrating framers' intention that enforcement authority under the Reconstruction Amendments would mirror that under the Necessary and Proper Clause).

("Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting.") (emphasis added); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (Congress is entitled "to exercise its discretion in determining whether and what legislation is needed" to enforce the Fourteenth and Fifteenth Amendments); *Tennessee v. Lane*, 541 U.S. 509, 555 (2004) (Scalia, J., dissenting) ("We said that 'the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment' is the flexible 'necessary and proper standard' of *M'Culloch v. Maryland*…") (quoting *Morgan*, 384 U.S. at 651).

In each of the Supreme Court's congruence and proportionality cases, the challenged law did not involve racial discrimination. The Court has never applied *Boerne* to a statute enacted to enforce the prohibition on racial discrimination found in the Reconstruction Amendments. *See id.* at 561 (Scalia, J., dissenting) ("Giving § 5 [of the Fourteenth Amendment] more expansive scope with regard to measures directed against racial discrimination by the States" fulfills the "principal purpose of the Fourteenth Amendment.").

More specifically, the Court has never applied *Boerne* to any legislation enacted pursuant to Congress's Fifteenth Amendment powers to stamp out racial discrimination in voting. Indeed, in *Lopez v. Monterey County*, 525 U.S. 266, 283-87 (1999), the first case concerning the constitutionality of a provision

of the VRA after *Boerne*, the Court did not apply the "congruence and proportionality" test. And in its *Boerne* cases, the Court has always pointed to the VRA as legislation properly enacted within Congress's constitutional authority. *See Boerne*, 521 U.S. at 530 (describing VRA as the exemplar of proper Congressional legislation); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) ("The ADA's constitutional shortcomings are apparent when … compared to Congress' efforts in the Voting Rights Act…").

But even if the Court were to apply the congruence and proportionality test here, it would be satisfied. In applying the test, a court must take three steps: (1) identify "the scope of the constitutional right at issue," *Garrett*, 531 U.S. at 365; (2) examine the record for a "pattern of constitutional violations on the part of the States in this area," *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003); and (3) determine if the legislative remedy is "tailor[ed] … to remedying or preventing such conduct," *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999).

First, heightened deference to Congress is warranted here, given the magnitude of the right at stake. The right to vote free of racial discrimination is a "fundamental" right expressly secured by the Constitution. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). Unlike for instance, age-based discrimination, discrimination on the basis of race involves a suspect classification, warranting

robust Congressional prophylactic legislation. "[T]he Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." *Mitchell*, 400 U.S. at 127.

Second, in amending Section 2 to include a "results" test in 1982, Congress compiled an extensive record, including testimony of over 100 witnesses spanning 27 days in the Senate alone, identifying a widespread pattern of race-based discrimination in voting throughout the country. *See Blaine County*, 363 F.3d at 908, 909 ("Congress concluded that an intent requirement would undermine efforts to eliminate invidious discrimination [in voting]," and that the issue of intent was irrelevant if existing election practices serve "'to exclude blacks or Hispanics from a fair chance to participate …'") (quoting S. Rep. 97-417, at 43).

This record is sufficient to support the application of Section 2 to Washington's felon disfranchisement law. Congress enacted a "result[s]" test applicable to all "voting qualification[s]" without exception, knowing from experience that enumerating a specific list of prohibited practices would be, by itself, insufficient to end discrimination in voting, because "new ways and means of discriminating" could arise, such that "[b]arring one contrivance too often has caused no change in result, only in methods." H.R. Rep. No. 89-439, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441. Thus, courts have

applied Section 2's results test to a variety of voting "qualifications" and "practices" not expressly discussed in the legislative record, such as judicial elections and punch card ballots, without raising any constitutional concerns. *See supra* § I.A.

Notably, in the *Boerne* line of cases, the Court has required Congress to develop records concerning only the *type* of discrimination at issue (*e.g.*, religious discrimination), and not specific *practices* being challenged (*e.g.*, zoning ordinances). *See, e.g., Boerne*, 521 U.S. at 530 (noting that Congress had failed to compile *any* "examples … of religious bigotry"); *Fla. Prepaid*, 527 U.S. at 640 ("Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. Unlike the undisputed record of racial discrimination confronting Congress in the voting rights cases…"). Congress's record regarding voting discrimination generally is therefore sufficient to support the application of Section 2 here.

But if this Court seeks evidence specific to the discriminatory effect of felon disfranchisement laws, it should look no further than the uncontested record in this case. Courts may take notice of evidence outside of the legislative record when applying the congruence and proportionality test. *See, e.g., Lane*, 541 U.S. at 525 (looking to evidence of discrimination against the disabled from state statutes and prior judicial decisions in order to uphold Title

II of the ADA); *Hibbs*, 538 U.S. at 729 (examining prior court decisions for evidence of discrimination against women). Here, the record includes "compelling evidence of racial discrimination and bias in Washington's criminal justice system," such that Washington's felon disfranchisement law '"clearly hinder[s] the ability of racial minorities to participate effectively in the political process…."' *Farrakhan*, 2006 WL at *6 (*quoting Farrakhan I*, 338 F.3d at 1220). This record is sufficient to support the application of Section 2 to Washington's felon disfranchisement law.

The third step is to determine if prophylactic legislation is "proportional" to the documented harms, because Congressional power, although broad, is not unlimited. Here, Section 2 is a limited exercise of Congressional authority in several respects. First, it imposes no affirmative obligation on States, requiring only that felon disfranchisement laws be subject to the same "results" standard that is currently applied to all other "voting qualification[s]." This is obviously a more limited remedy, than, for instance, Section 5's preclearance obligation, which has been upheld previously by the Supreme Court. *See Lopez*, 525 U.S. at 283-84.

Second, Section 2 requires the invalidation of a felon disfranchisement law only in limited situations. Plaintiffs do not urge a *per se* ban on Washington's felon disfranchisement law. Nor do plaintiffs argue that all felon

disfranchisement laws with racially disparate outcomes are unlawful. The Section 2 "results" test "does not look for mere disproportionality in electoral results." *Blaine County*, 363 F.3d at 909. Rather, a challenge to a felon disfranchisement law under Section 2 can only be successful where, as here, there is widespread discrimination in a state's criminal justice system. In Washington, "some people becom[e] felons … *because of their race*," *Farrakhan II*, 590 F.3d at 1015 (emphasis added), and thus, Washington's felon disfranchisement law "results in a denial" of the right to vote "on account of race." By requiring plaintiffs to make substantial showings beyond mere statistical disparities, "section 2 is 'self-limiting,'" such that its application satisfies the congruence and proportionality inquiry. *Blaine County*, 363 F.3d at 909.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiffs' previous submissions to the Court, the judgment of the district court should be reversed.

Dated this 12th day of August, 2010.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPE FACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that this brief complies with the type-volume limitation granted by court order dated June 28, 2010 because this brief contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: August 12, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 12, 2010.

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